King Manor Care Center *and* District 6, International Union of Industrial, Service, Transport and Health Employees. Case 22–CA–16834

September 18, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On February 5, 1992, Administrative Law Judge Edwin H. Bennett issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the take the action set forth in the Order.

[1] We shall leave to compliance, the determination of whether the Respondent owes any additional payments and interest to District 6's welfare plan.

Under certain limited circumstances, Member Oviatt would not find that an employer's failure to make contractually required payments violates Sec. 8(a)(5) and (1) of the Act. See his dissent in *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991). In Member Oviatt's view, however, the Respondent here has not met its burden of establishing its defense. At a minimum, under Member Oviatt's standard, the Respondent was required to show that it requested to meet with the Union to discuss its habitually late payments. Here, there is no indication that the Respondent ever sought to negotiate with the Union over an alleged inability to make timely payments. Nor is there evidence that, at any time during the period when the Union was complaining to the Respondent about its delinquency, the Respondent raised with the Union its view that the contract did not require it to make monthly payments. Under these circumstances, Member Oviatt agrees with his colleagues that the Respondent violated Sec. 8(a)(5) and (1) by failing to timely make contractually required welfare payments.

Steven M. Kessler, Esq., for the General Counsel.
Morris Tuchman, Esq., for the Respondent.
Lawrence Goodman, Esq. and *Jonathan Walters, Esq. (Walters, Willig, Williams & Davidson)*, and *William Perry*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. On January 7 and 14, April 30, and June 19, 1991, a hearing was conducted on allegations in a complaint which had issued on October 17, 1990, and which was amended at the hearing on April 30, 1991, that King Manor Care Center (Employer or Respondent) unilaterally changed conditions of employment of employees represented by District 6, International Union of Industrial, Service, Transport and Health Employees (Union) by failing to make contractually required payments to a health and welfare fund, or by delaying such payments. The underlying charge was filed on February 28, 1990, and served on March 7 by certified mail, contrary to Respondent's denial.

Respondent denies that it made unilateral changes asserting that its payments, however irregular or delinquent, followed a regular and consistent pattern from the inception. Furthermore, Respondent contends the Board is not the proper forum to remedy what at most arguably is a breach of contract. Respondent's answer also raised the affirmative defense of ''statute of limitations'' (Sec. 10(b) of the Act), a claim not further litigated or argued in the posthearing brief and which therefore might be relegated to the status of a nonissue except for the insertion of the matter into the case by General Counsel, as noted directly below, and the fact that the complaint itself dates the violation as beginning on August 28, 1989, more than 6 months before service of the charge on March 7, 1990.

Additional issues presented by this litigation concern Charging Party's request for sanctions against General Counsel, as represented by the Regional Office, for prosecutorial misconduct, particularly General Counsel's refusal of Charging Party's repeated requests at the hearing to amend the complaint to allege that Respondent unlawfully refused to provide the Union with the names of employees eligible for welfare coverage and on whose behalf payments had been made. Although General Counsel asserted that Section 10(b) barred such amendment, on the last day of hearing General Counsel advanced a theory that the duty to furnish such information was ''inherent and implicit'' in the obligation to make payments and accordingly, in remedying the violation based on the breach of that obligation, Respondent should be required to furnish that very information. Subsequently, in his brief, General Counsel completed his about face and stated unequivocally that ''Respondent violated Sections 8(a)(1) and (5) of the Act by failing to identify employees who were eligible for welfare contributions,'' a statement I construe as a motion to amend the complaint to that effect.

Finally, an issue exists regarding General Counsel's request, again made on the last day of hearing, that as part of any remedy there be included what has become known as a ''visitorial clause.'' The above positions raise several questions including the very obvious concerns of due process and proper procedure, all of which will be considered below.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by all parties, I make the following

[1] Errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. JURISDICTION

As amended at the hearing, the complaint alleges, Respondent admits (see fn. 1(e)) and therefore I find, that the Employer operates a nursing home in Neptune, New Jersey, providing health care and related services to its residents for which it receives gross revenues in excess of $250,000 annually. It also annually purchases and receives, directly from outside the State, goods and materials in excess of $5000. Accordingly, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Although the complaint fails to allege that the Union is a statutory labor organization, the record contains ample undisputed evidence that employees participate in it and that it exists, in whole or in part, for the purpose of dealing with employers concerning various terms and conditions of employment. Accordingly, the complaint is amended, sua sponte, to reflect these facts and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Unit*

The Respondent admits the complaint allegation that it has been party to a collective-bargaining agreement with the Union, effective for the period February 19, 1988, to February 19, 1991, in which it has recognized the Union as the exclusive bargaining representative on behalf of employees, not otherwise identified by classification, at the nursing home. However, since the contract defines the included unit employees with greater particularity than is recited in the complaint I find the unit, in accordance with the contract language, to be all full-time and regular part-time nursing aides and dietary workers who work 60 hours or more out of the regular full-time, 80-hour work period, but excluding all other employees, clericals, guards, supervisors, registered nurses, licensed practical nurses, technical and professional employees, supervisory cooks, instructors, administrative and executive employees and confidential employees.

I also find the Union is the exclusive representative in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act, and the complaint, which omits such allegation (no doubt an oversight) again is amended sua sponte to reflect the Union's status as such statutory representative, a matter not in dispute.

B. *The Violation*

The contract has the following provision:

ARTICLE XVII

WELFARE

> 17.1 The Nursing Facility will contribute to the Local 6 Welfare Plan the sume [sic] of Forty Five Dollars ($45.00) per month (or major part thereof) for all full-time active employees, who are scheduled to work forty (40) hours per week or more, to provide hospitalization and major medical insurance.

Although the contract was executed on its effective day, February 19, 1988, the very first payment to the Union was made on August 17, 1988, in the amount of $2000 to cover the months of July and August. There is no evidence in the record concerning the number of employees covered by the payments nor does the record disclose whether there were eligible employees for whom payments were required at an earlier date.

The next payment made was on July 17, 1989, in the amount of $1035. In this instance, the face of the check recites that it covered seven employees for September and October 1988 for $315 each month and nine employees for November 1988 for $405. In terms of the number of employees eligible for coverage, the parties stipulated that the Employer's application of the contract language (scheduled to work 40 hours per week or more) to those who actually worked 17 or more days in a 22-day cycle was an acceptable interpretation.[2] This formula resulted in more liberal coverage than called for by the contract. Calculating an 8-hour day as a standard, the 17 days equate to 136 hours in a monthly cycle of 22 workdays. This, in turn results in a requirement of 31.6 hours of work in a week (using 4-1/3 weeks to a month) or, at most, 34 hours of work in a week (using 4 weeks to a month), somewhat less than the 40 hours per week called for in the contract.

In effect, the Employer considered those employees eligible for coverage who worked approximately three-fourths of a full-time schedule, a formula closely tracking the recognition clause of the contract. And, in accordance with the language of that clause, the coverage was applied to those actually working the specified hours, not merely scheduled to work, terminology which conceivably could include employees who leave the job between creation of a schedule and the work week one month later. No evidence was offered disputing the Employer's interpretation of the contract. Accordingly, even apart from the stipulation, under the circumstances here, that interpretation is perfectly reasonable.

In regard to the number of employees who actually met the eligibility formula, Perlowitz credibly testified, in conjunction with original Employer records, that this was determined by examination of daily work records called ''scrub sheets.'' Utilizing these records, Perlowitz compiled summaries for the entire period encompassed by the complaint. Neither General Counsel nor Charging Party offered any evidence questioning the accuracy of Respondent's submission. Although both parties complained about Respondent's failure to preserve the monthly work schedules, their complaints do

[2] In its brief Charging Party states that the measure of eligibility agreed to was those employees s*cheduled* to work 16 days in a 22-day period. Charging Party misreads the record in this regard. Michelle Perlowitz, Respondent's bookkeeper, was examined by the court regarding the basis on which she determined employee eligibility. She very carefully explained even though an employee may have been scheduled to work the requisite number of days, she excluded those who failed to work for one reason or another. The court then asked ''Now is it your testimony . . . the respondent considered those eligible for welfare payments those who worked sixteen days in a twenty-two day work cycle?'' After the 16 was corrected to 17 Perlowitz answered ''Right.'' Following discussion as to whether or not the eligibility formula would be an issue in the case all parties agreed there would not be and that Respondent's formula was acceptable.

not substitute for evidence. Respondent was under no obligation to preserve these schedules absent a subpoena calling for their production, a standard trial practice that neither party sought to utilize. Furthermore, these schedules only showed, for a month in advance, who was scheduled to work, information irrelevant to the issues in the case in light of the eligibility formula utilized for obligating welfare payments to those employees who actually worked. For this purpose, the ''scrub sheets'' are the most reliable documents and they were voluntarily produced by Respondent.

The only evidence introduced by General Counsel and Charging Party relating at all to this issue was testimony by William Perry, the Union's president, estimating the size of the unit at somewhere between 65 and 90 employees. This evidence is insufficient to refute the Respondent's evidence described above. Admittedly, Perry could only guess at the *unit* size from attendance at union meetings, these guesses are unrelated to specific months, Perry could only guess at the unit which may not necessarily be equivalent to eligibility for welfare payments, and such guesses are, by nature, far less reliable then records, the accuracy of which remain unquestioned in the absence of specific and reliable evidence to the contrary. Accordingly, I place full credence on Respondent's (Perlowitz') testimony regarding the number of unit employees for whom a welfare payment should have been made and following are the figures for the period covered by the complaint and prior thereto: For 1989, January—17, February—20, March—22, April—21, May—22, June—16, July—17, August—25, September—23, October—22, November—25, and December 25. For 1990, January—25 and February—32.

As noted, the July 17, 1989 check covered payments due for September, October, and November 1988. According to Perry, starting in about February 1988 he orally complained about Respondent's failure to make timely payments to Meyer Rosenbaum, Respondent's manager, and demanded that such payments be made. He had about six or eight such conversations through August 1990. Rosenbaum's response was that Respondent was short of money and that anyway Perry was ''selling'' the Union and that Respondent might as well pay the new union. These conversations are undenied.

Additionally, on August 25, 1989, Perry wrote Respondent protesting the failure to make contractually required welfare payments as well as the failure to furnish the names of unit employees, and requesting immediate compliance with the request. By letters of October 12 and December 5, 1989, Perry again demanded welfare payments. On January 30, 1990, Perry wrote Respondent repeating the Union's demand for payment of all moneys due as well as for a list of unit employees. The last letter was written on February 8, 1990, warning of legal action unless all welfare contribution delinquencies were remedied, with interest. Respondent did not reply to any of these letters except that beginning September 1, 1989, it sent the following checks to the Union, which together with the July 17, 1989 check, and one dated August 17, 1988, for June and July 1988, are the only payments to the welfare fund reflected by the record:

Date of Check	*Amount*	*Period Covered by Check*[3]	*Number of Eligible Employees*	*Amount Actually Due*
September 1, 1989	$1,665	January 1989	17	$1,665
		February 1989	20	
September 15, 1989	2,025	March 1989	22	1,935
		April 1989	21	
October 25, 1989	2,430	May 1989	22	1,710
		June 1989	16	
August 16, 1990	5,000	July through	17, 25, 23 =137	6,165
		December 1989	22, 25, 25	
December 4, 1990	5,000	January 1990	25	2,565
		February 1990	32	
Totals	$16,120		312	$14,040

It is readily apparent that when the charge was served on March 7, 1990, the Respondent was 8 months in arrears having last made a payment to the fund in October 1989 for employees who had worked in June 1989. After service of the charge Respondent did not make a payment for another 5 months with a total of almost 10 months having elapsed between payments. By the time of the hearing, Respondent had finally made sufficient payments to cover all eligible employees for the 6-month period encompassed by the charge (approximately September 1989 to March 1990). However, for employees who had worked September through December 1989, Respondent failed to contribute on their behalf until August 16, 1990. And for employees who worked January to March 1990, Respondent failed to contribute until December 1990. Respondent offered no explanation for these delays in payment, which in some cases spanned almost 1 year, and all we are left with is Perry's undenied and credited testimony that Respondent could not afford to, or arbitrarily would not, pay the amounts owed in a timely fashion.

Although it appears that eventually Respondent may have paid about $2000 over the amount owed through December 1990, this is a circumstance not fully explained. According to Perlowitz, she was directed to send $5000 on August 1990

[3] According to information written on the check or based on Perlowitz' testimony. It would appear that no payments were made for the period February 19 through May 1988 and for the months of August and December 1988. Whether there were eligible employees working in these months is not known. Consequently, and in the absence of any explanation, no conclusions can be reached regarding these ''missing'' payments.

at which time she phoned Perry for instructions on how to apportion the money. Perry told her to write on the check that the sum was ''on account'' which she did then and on the December 4 check. Whether the excess money represents a credit, or is for another purpose, is not at issue.

Discussion

Contrary to Respondent's argument that the Board process is not appropriate for cases such as these because they are nothing more than collection matters arising from a breach of contract, it is now firmly established that the failure to make, or delay in making, contractually required fringe benefit payments to fringe benefit funds, constitutes a unilateral act in violation of Section 8(a)(1) and (5) of the Act which is not excused by a financial inability to pay. *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991). Although the Board in the cited case acknowledged that althogh not every contract breach constitutes an unfair labor practice, it held that the employer's failure there to make four successive contractually required trust fund payments violated the Act and it rejected the defense that such failures were no more than a de minimis breach of contract.

Similarly, the Respondent here was required by contract to make monthly payments, an obligation it violated consistently from the time of its first payment in August 1988 until the last payment shown by this record in December 1990. Of the seven payments made, none represented a monthly payment and not one was made on time. For the period covered by the complaint, payments were delayed for as long as 1 year over the vigorous objection of the Union, evidenced by Perry's written and oral demands for prompt payment. This conduct was substantial and not a de minimis breach of the contract. Further, although Respondent eventually made full restitution to the welfare fund for this period of time, it did so by two payments 4 months apart and almost 1 year after the amounts came due. Thus, we have a situation where no payment was made on time, where there were substantial delays and attendant delinquencies which accompanied every payment ever made, and where none of the payments can be said to have followed a regular or predictable pattern. Respondent's conduct, which was not condoned by the Union, constitutes a significant disregard for the terms of the contract it had negotiated and therefore supports a finding that Respondent violated Section 8(a)(5) of the Act in accordance with the principles of law discussed in *Zimmerman Painting*, supra. See also *Detroit Cabinet Co.*, 247 NLRB 1415 (1980) (delinquent payments over an extended period constitute a renunciation of the contract obligation with the same force and in the same manner as is a flat refusal to pay).

Respondent's affirmative defense that a finding of violation is barred by the 6-month statute of limitations provided by Section 10(b) of the Act has no merit. It is not necessary to consider when, if ever, the Union had clear and unequivocal notice that Respondent would not abide by its contractual requirement to make monthly payments to the welfare fund. Where, as here, the charge was filed during the life of the agreement, every monthly failure to pay triggers a new limitations period and a charge is timely filed with respect to any such failure without regard to earlier refusals. Each monthly refusal, or delay as in this case, constitutes a separate and discreet violation independent of the evidence that may support earlier violations. Inasmuch as this case does not involve an alleged repudiation of the entire agreement but only an unlawful unilateral change of a particular provision, the ''continuing violation'' doctrine is applicable and therefore the charge filed and served on March 7, 1990, is timely with respect to any unilateral changes commencing September 7, 1989, a date 6 months prior to service of the charge on March 7, 1990. *A & L Underground*, 302 NLRB 467 (1991). Although the complaint alleges the violation began on August 28, 1989, 6 months prior to filing of the charge in the Regional Office, this is a minor and insubstantial error not involving a material issue. Respondent is not prejudiced by a finding of a violation a mere 7 days later than that alleged, the real issue concerns the alleged nonpayments and not the exact date such conduct began, the matter was fully litigated upon clear notice, and accordingly the complaint is deemed amended to conform to the evidence regarding the date of violation. Compare Federal Rules Civil Procedure 15(b) permitting such amendment even after judgment.

The General Counsel's attempt to remedy an alleged unlawful failure to furnish the names of eligible unit employees and its posttrial motion which seeks a finding of violation regarding such alleged failure, is another matter however, and involves much more than a mere technical error as is the case regarding the date of violation. Rather, this effort raises significant and substantial material issues, including Charging Party's request that General Counsel be reprimanded or in some manner censured for failing to place in issue this allegation at an appropriate time. A review of the proceedings is essential to understand the ramifications of the questions raised.

The charge, which was filed on February 25, 1990, alleged simply that Respondent had ''refused to remit contributions'' to the Union's health fund. Nine months later, on October 17, 1990, the complaint issued alleging only that Respondent changed the contract ''by failing to make contributions'' to the welfare plan. The hearing opened on January 7, 1991, and thus, almost a year after the charge the only violation Respondent was alleged to have committed was the failure to make payments to the fund. On the first day of trial, at the time General Counsel placed in evidence Perry's letters of August 25, 1989, and January 30, 1990, the court questioned General Counsel concerning the significance of the requests for information set forth in those letters in light of the absence of any complaint allegation relating thereto. General Counsel asserted the request for names and addresses of employees ''is not directly part of the case'' and that ''what we're seeking here is just the welfare contributions.'' Counsel stated the only purpose in introducing the letters was ''just to corroborate'' presumably Perry's testimony that he had orally demanded of Respondent that it make welfare fund payments (as noted the letters also refute Respondent's defense that the Union consented to a departure from the contract language requiring monthly payments). On further inquiry by the court whether there would be an ''allegation of a refusal to bargain by failing to furnish names and addresses'' General Counsel replied ''we are not going to allege that.''

The matter was discussed further and Charging Party noted that the rule of *Jefferson Chemical Co.*, 200 NLRB 992 (1972), precluding subsequent litigation of charges arising from the same set of facts that could have been discovered in the prior litigation would operate to its detriment. Al-

though Charging Party protested General Counsel's refusal to amend the complaint, and sought to adduce evidence on the issue, Respondent's objection to such litigation was sustained because of General Counsel's position.

On January 14, at the very beginning of the second day of trial, Charging Party made a lengthy statement critical of General Counsel's knowing refusal to amend the complaint to allege an unlawful refusal to furnish names of unit employees. Furthermore, according to Charging Party, this was a clear dereliction of General Counsel's statutory obligation requiring, at least, Board comment critical of General Counsel's handling of the case which left Charging Party without an opportunity to secure full relief from Respondent's violations. In reply, General Counsel stated that he only recently learned from Charging Party of the refusal to provide the information, that an allegation of that nature does not come within the continuing violation theory so as to revive an expired statute of limitations period, that in this instance the 10(b) 6-month statute of limitations period would apply if the complaint would now be amended, that the dates of the Union's requests for the information were outside the 10(b) period and accordingly, ''General Counsel decided not to amend the complaint.''

The issue surfaced again on April 30, 1991, when during Respondent's case, Charging Party voiced its displeasure over General Counsel's refusal to amend the complaint because by so doing the full nature of the violation could not be addressed. Of particular concern, according to Charging Party, would be the problems that surely would be encountered in effecting compliance even if the case was won on the allegations as it then stood, a matter that Charging Party had discussed with General Counsel off the record. Although invited by the court to comment, General Counsel declined to do so and this issue, to all appearances, was not, had not, and would not be a part of General Counsel's case.

However, appearances are not always what they seem to be, as we were all to learn when the hearing next resumed on June 19, 1991 (the last day of trial). General Counsel announced that he ''would like to change the legal theory'' and argue ''that inherent and implicit in the Employer's duty to contribute to the Union's welfare fund is also the duty to identify which employees they are making contributions on and which employees are entitled to have contributions.'' General Counsel requested that by way of ''remedy'' an order should issue requiring Respondent to furnish the Union with the names of unit employees on whose behalf welfare payments had been made as well as those employees eligible to receive such payments, not to remedy an alleged and proven unlawful refusal to furnish such materials (for General Counsel did not move to amend the complaint), but on the theory that such an order was an integral part of the remedy requiring that payments be made. Having earlier stated that the requirement to furnish the information was not a ''continuing one,'' and therefore a finding of a violation based on a refusal to meet such requirement would be barred by Section 10(b), General Counsel now advanced a theory that the requirement nevertheless was ''inherent and implicit'' in the continuing violation of refusing to make payments which was not barred by Section 10(b).

One would have thought that General Counsel's newly announced position also would have supported an amendment to the complaint to place the issue clearly and unambiguously before Respondent on the logical premise that what is ''inherent and implicit'' in a continuing violation might itself arguably also constitute a continuing violation in its own right. Or, we might have expected an amendment to the complaint that the refusal to furnish information is closely related (another way of saying inherent and implicit) to the refusal to contribute and therefore could be added to the complaint without a new charge. See *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), for a fuller discussion of when a complaint allegation is so ''closely related'' to the charge filed as to be considered timely with respect to that charge notwithstanding some variance between the charge and complaint. But, General Counsel chose again not to amend the complaint under any theory, seeking relief only by way of an expanded remedy. At least, that is what everyone, including Respondent, was led to believe on the final day of trial.

The Charging Party, in its brief, joined in General Counsel's request for the relief requested while at the same time expressing fear the Board may refuse to grant it because of ''GC's initial failure to amend the complaint, and its assurances to Respondent that it would not pursue this allegation.'' This fear appears to recognize the existence of a substantial due process question which, I conclude, controls the disposition of this issue. In addition, Charging Party's brief renewed the request ''that the General Counsel's questionable handling of this portion of the case be criticized on the record,'' in the event the requested relief is denied.

Having gone half way, General Counsel in his posttrial brief, for the first and only time, finally went the last mile. While acknowledging the absence of a complaint allegation regarding the issue, and although repeating the argument advanced in requesting a remedy that the duty to supply the information is inherent in the duty to contribute, it is additionally asserted that ''Respondent violated Section 8(a)(1) and (5) of the Act by failing to identify the employees who were eligible for welfare contributions which would have enabled the Union to ascertain whether the Employer was making the required contributions to the Union's Welfare Fund.''

For the following reasons, I deny what in essence is a motion to amend the complaint in the manner quoted as well as the request for a remedy requiring the Respondent to furnish such information.

Unless General Counsel is correct that the duty to furnish names of employees is ''inherent and implicit'' in the duty to make contributions, apparently thereby avoiding the need to specifically inform Respondent that it must defend against a separate cause of action (and if that is a correct statement of the law why the need to allege a violation in the brief), we must determine if due process has been met in this case. Unfortunately, General Counsel does not address whether a due process question exists, nor does he cite a single authority in support of the ''inherent and implicit'' argument and I am not aware that such is the case.

The traditional remedy to a failure to contribute to a welfare fund, is to make employees whole for losses suffered as well as to pay past delinquencies to the fund, see, e.g., *Zimmerman Painting*, supra, at least where the union continues as the bargaining representative, cf. *J.R.R. Realty*, 301 NLRB 473 fn. 7 (1991). Indeed *Detroit Cabinet Co.*, supra, relied on by General Counsel as authority for the proposition that a delinquent payment is as much a unilateral change as is a nonpayment, demonstrates the need to allege and prove, as

a separate violation, an unlawful refusal to permit an audit in order to police the contract, or as in the instant case an unlawful refusal to furnish information, to justify a remedy for that kind of violation. In a very similar context, the Board has held precisely that. *Lancaster Community Hospital*, 303 NLRB 370 (1991), involved a request by General Counsel for an order requiring the employer to furnish certain information to the Union as part of the remedy to an unlawful refusal to bargain with a newly certified union. Despite the fact that case came to the Board on a Motion for Summary Judgment, I believe the following statement is applicable here.

> Although the duty to bargain includes a corresponding duty to provide necessary and relevant information, the Board traditionally has not issued an order specifically requiring a respondent to provide such information absent an allegation that the respondent has actually refused to do so. Here, neither the charge nor the complaint contains an allegation that the Union requested or that the Respondent refused to provide necessary and relevant information to the Union.

Absent authority to the contrary, I reject as legally unsupportable, the argument that it is appropriate to compel a respondent to furnish names of employees eligible for welfare payments as part of the remedy for a violation based solely on the failure to make timely payments. Accordingly, it must be determined if Respondent has been accorded due process before the full relief requested can be granted, purely as a remedy to the alleged violation as proposed on the last day of trial, or as remedy to a new violation as proposed in the brief. Under the peculiar circumstances of this case, particularly the knowing refusal to timely plead a violation, I conclude that the issue of unlawfully refusing to furnish information has not been fully litigated and Respondent's due process rights of full and timely notice have not been met, notwithstanding General Counsel's request for the remedy in issue on the last day of trial.

As noted earlier, the Board and the Federal Rules take a very liberal approach to allowing complaint amendments, even after trial, to deal with issues that have been fully litigated even though never specifically alleged as a violation in the complaint. See, e.g., *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1970). To conclude that a matter has been fully litigated, however, requires that the General Counsel satisfy the obligation ''to clearly define the issues and advise an employer charged with a violation . . . of the specific complaint he must meet and provide a full hearing upon the issue presented [and the failure to do so] is . . . to deny procedural due process of law.'' *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1074 (1981). The court in *Soule* discusses at length the notion of procedural due process to which respondents are entitled. The factors to be considered can be summarized as follows; prior notice and an opportunity to be heard, timely recital of the matters of law and fact asserted, and a fair opportunity for a defense to be prepared and litigated. If these elements are lacking, the Board may not find a violation or take enforcement action. The test ultimately is one of fairness, a determination that rests on the facts in each case, the essence of which is whether or not respondent was provided with a clear and timely statement of the allegations against it so that it could prepare and present a defense.

Application of these guiding principles leads me to conclude that to compel Respondent to furnish the names of employees eligible for welfare fund contributions, whether viewed as a remedy to the violation alleged in the complaint or to the proposed posttrial amendment to the complaint, would not be consistent with Respondent's due process rights to timely and clear notification of the charges against it so that it could prepare and litigate a defense. From the filing of the charge on February 25, 1990, to the issuance of complaint on October 17, 1990, through the trial of the case from January 7, 1991, up to June 19, 1991, the Respondent was not alleged to have committed any violation of the Act in this connection. More than that, Respondent repeatedly was assured by General Counsel, over the vigorous opposition of Charging Party, that such conduct was not part of the case and furthermore that no violation could be found because of the statutory time limits of Section 10(b) of the Act. Not only was Respondent not told it was charged with misconduct, it affirmatively was led (or misled) to believe that its acts and conduct regarding the furnishing of the information in issue was not unlawful. Under these circumstances due process requirements would be turned upside down if General Counsel's motions were to granted.

Nor do I consider the request for relief stated at the hearing on June 19, adequate notification to support a contrary determination. General Counsel's earlier assertion that a finding of violation was barred by Section 10(b) of the Act was not withdrawn or modified in any way. Respondent still was entitled to rely on this position particularly as General Counsel still had not forthrightly sought to amend the complaint. As it turns out, General Counsel did not then or later support the request for relief alone with any legal precedent which may account for the posttrial realization that it would be necessary to amend the complaint to clearly allege a violation in order to obtain the desired remedy. We can only speculate on General Counsel's reasoning just as we can only speculate on what defenses (other than Sec. 10(b)) Respondent might have interposed regarding this issue, or how it may have litigated the case throughout the first 3 days of trial between January 7 and April 30. General Counsel can not profit from its self-imposed limitations. It was General Counsel's decision to introduce evidence regarding the requests for information for very limited and collateral purposes and Respondent was informed in the clearest terms that it was not called upon to explain its refusal, if in fact it did refuse, or even to dispute the requests themselves. The issue was foreclosed from litigation for almost 15 months by the acts and conduct of both Charging Party in failing to file a charge on this matter and by General Counsel in refusing to issue a complaint. Respondent thus was precluded from presenting a proper defense and it would be prejudicial to grant the relief requested.

Given the way this case was litigated it is even doubtful General Counsel established prima facie an unlawful refusal to furnish the information, let alone to conclude that this issue was fully and fairly litigated on adequate notice. The June 19 notice for relief was much too late in the litigation, and insufficiently explicit in light of all that went before, on which to rest a finding that Respondent was fairly warned of its potential liability. Obviously the posttrial attempt to

amend the complaint, a fortiori, fails any standard of due process. See *Federated Department Stores*, 287 NLRB 951 (1987) (no violation of 8(b)(1)(A) based on breach of duty of fair representation as argued in the brief where complaint not amended at hearing despite judge's request to do so although violation found based on refusal to refer a nonmember from an exclusive hiring hall).

Thus we come to the final, and in a real sense closely related, issue concerning Charging Party's requests that General Counsel be cited, or in some manner criticized, for alleged mishandling of the prosecution of this case particularly the refusal to amend the complaint during the course of the trial.

I find that I lack jurisdiction to entertain these requests. By Section 3(d) of the Act the Congress has decreed that judicial review may not be had of the General Counsel's prosecutorial decisions including the issuance of complaints. *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112 (1987). Clearly, this principle of law, which grants final, exclusive, broad and unreviewable discretion to file and withdraw complaints to the Regional Director subject to oversight by the General Counsel, forbids review of these decisions by the Courts, the Board, and without doubt administrative law judges. Charging Party does not suggest any contrary authority or argue the inapplicability of the principle to this case. Notwithstanding that counsel for General Counsel sought to amend the complaint after the trial to place in issue the very allegation Charging Party requested and was denied throughout the trial, thereby perhaps indicating that General Counsel concedes it was in error by its earlier refusals to amend, the rule of law barring judicial review nevertheless applies. By its very nature, a discretionary act allows for the possibility of an admitted error in judgment (inasmuch as I am not reviewing General Counsel's decision I do not mean to suggest that any error was committed), but as the Supreme Court explained, the statutory scheme fashioned by Congress in the Act, was to vest complete and unreviewable authority in the General Counsel in order to permit the broadest range of discretion.

In addition, Charging Party's failure to exhaust the administrative review to which it was entitled renders its requests for judicial review premature. There is nothing in the record to show that Charging Party appealed the Regional Office's earlier refusals to amend the complaint to the office of the General Counsel and thus it can not maintain that the General Counsel (as distinguished from the Regional Office representatives) refused to amend the complaint. Nor did Charging Party, for that matter, take the simple preliminary step of filing a charge that unmistakably and unequivocally alleged an unlawful refusal to furnish information which would have put in motion a process that could have resulted in a decision by the General Counsel in the event the Regional Director refused to issue a complaint. It would appear to the most casual observer that to entertain the request for judicial review as requested by Charging Party easily could lead to no end of second guessing. Avoidance of this thicket is much to be desired.

In considering Charging Party's request for sanctions, no thought should be entertained that the personal conduct of counsel for General Counsel, Kessler, is being called into question. His comportment at the hearing was consistent with the highest standards of professional behavior and all that is at issue in this discussion are the prosecutorial decisions complained of, whether made by Kessler or anyone else authorized to act on behalf of the General Counsel. Further, I find no support for Charging Party's request in a letter forwarded to me by Charging Party authored by an assistant to the General Counsel in which she expresses her personal opinion that Kessler's posttrial brief, although adequate, is ''not up to the Region's usual high standards'' and ''could have been of a higher quality,'' conditions she attributed to Agency budgetary problems. This letter was sent to Charging Party in response to a complaint to the General Counsel about the quality of the brief and the prosecution of the case. I decline to be drawn into this controversy beyond that deemed necessary for the conclusions reached above and find no reason to comment on or to given any consideration to the letter in question.

CONCLUSIONS OF LAW

1. Ring Manor Care Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 6, International Union of Industrial, Service, Transport and Health Employees is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees (the unit) constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time nursing aides and dietary workers who work 60 hours or more out of the regular, full-time, 80-hour work period, but excluding all other employees, clericals, guards, supervisors, registered nurses, licensed practical nurses, technical and professional employees, supervisory cooks, instructors, administrative and executive employees and confidential employees.

4. At all times material, the above-named labor organization has been, and is now, the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) by failing and refusing since September 7, 1989, to make timely payments to the Local 6 Welfare Plan as required by the collective-bargaining agreement between Respondent and the Union.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Accordingly, it is recommended that Respondent be ordered to make all contractually required payments to the welfare plan in a timely fashion. Inasmuch as the practice of delinquent payments over an extended period necessarily resulted in the loss of interest to the plan, Respondent shall be required to pay interest applicable to such delinquent payments in accordance with the criteria set forth in *Merryweather Optical*

Co., 240 NLRB 1213, 1216 (1979). I shall also require the Respondent to make whole any covered unit employee who may have suffered any loss as a result of the delinquent payments, *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), with such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

General Counsel's request in his brief for a visitatorial clause is denied. It is argued that the requirements for granting such clause are present here, i.e., ''evidence indicating a likelihood that the Respondent will attempt to evade compliance,'' *Cherokee Marine Terminal*, 287 NLRB 1080, 1083 (1988). In support, General Counsel again refers to the rejected and nonlitigated, and therefore irrelevant, assertion regarding Respondent's failure to turn over a list of employees. Moreover, even if that had been found to be a violation it hardly evidences the likelihood of a future refusal to comply with an order to furnish such list. In effect, General Counsel relies on the past violation as evidence of future noncompliance. Such contention is applicable in every case where a violation is found and those cases requiring extraordinary relief would be indistinguishable from run-of-the-mill cases. The argument falls of its own weight.

General Counsel next relies on a claim that Respondent denied General Counsel reasonable access to certain records, whether during the investigation or trial is not clear. As there is no supporting record evidence, this statement is mere opinion. Nor is the basis for such opinion presented. Certainly, Respondent has no statutory obligation to furnish anything to General Counsel absent a valid subpoena, which is not the case here. As noted above, Respondent produced, voluntarily, useful and relevant documents, the scrub sheets, although General Counsel also wanted to examine the monthly work schedules which had been destroyed. However, at no time did General Counsel subpoena these documents, a simple procedure available, certainly after issuance of complaint. It is not clear to me why Respondent should be faulted for these ''missing'' documents. Furthermore, while there was some displeasure voiced by General Counsel over the arrangements regarding the voluntary production of the scrub sheets, it is unthinkable that a special remedy can result therefrom, particularly because the General Counsel, who began to question Perlowitz regarding these arrangements, withdrew that ''line of questioning'' after being asked to explain its relevance on objection by Respondent.

Lastly, the General Counsel claims Respondent was unwilling to assure access to records in the event of a violation. Here too, no record evidence is relied on to support such assertion which reduces it to another expression of opinion. Nor am I aware that Respondents' are required to guaranty in advance compliance with any order that may issue by the administrative law judge and/or the Board, or waive court review, under penalty of a special remedy for failing to do so. Therefore I find no merit to this, or any of the reasons advanced in support of a visitatorial clause, particularly as the only violation found is Respondent's failure to make timely payments.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, King Manor Care Center, Neptune, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing to make timely payments to the Local 6 Welfare Plan from September 7, 1989, as required by its collective-bargaining agreement with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse the welfare plan for any interest lost, in the manner described in the remedy section of this decision, as a consequence of the failure to make timely payments to the plan.

(b) Make future payments to the welfare plan in a timely manner.

(c) Make whole covered unit employees for any loss of benefits they may have suffered from the failure to make timely welfare plan payments after September 7, 1989, in the manner described in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of moneys due under the terms of this Order.

(e) Post at its facility in Neptune, New Jersey, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively and in good faith with District 6, International Union of Industrial, Service, Transport and Health Employees, by failing, since September 7, 1989, to make timely payments to the Welfare Plan as required by our collective-bargaining agreement with the Union.

WE WILL NOT make delinquent payments to the welfare plan on behalf of bargaining unit employees who are eligible for such payments in accordance with the collective-bargaining agreement. The bargaining unit is:

> All full-time and part-time nursing aides and dietary workers who work 60 hours or more out of the regular, full-time, 80-hour work period, but excluding all other employees, clericals, guards, supervisors, registered nurses, licensed practical nurses, technical and professional employees and confidential employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make future payments to the welfare plan in a timely manner.

WE WILL reimburse the welfare plan for interest lost as a consequence of our delinquent payments.

WE WILL make whole covered unit employees for any loss of benefits they may have suffered from our failure to make timely welfare plan payments after September 7, 1989.

KING MANOR CARE CENTER